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No. 99-138

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

♦

In the Matter of the Visitation of
NATALIE ANNE TROXEL AND
ISABELLE ROSE TROXEL, Minors.

JENNIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

♦

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Washington

♦

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

♦

Catherine W. Smith
Counsel of Record
EDWARDS, SIEH, SMITH & GOODFRIEND
701 Fifth Avenue, Suite 7170
Seattle, WA 98104
(206) 624-0974

Attorneys for Respondent Tommie Granville

RPI Legal Printers, Seattle, Washington

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the Supreme Court of the State of Washington err in holding that statutes granting "any person" the right to petition a court to order visitation with a child "at any time" improperly interfered with the constitutionally protected interest of fit, custodial parents to raise their children free of state interference?

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RESPONSE TO STATEMENT OF THE CASE

Tommie Granville and Brad Troxel lived together sporadically before Tommie stopped seeing Brad in June 1991, while she was pregnant with their second child Isabelle. After Tommie and Brad's separation, Brad's parents saw Natalie and Isabelle only during Brad's limited visitations.

Brad committed suicide on May 13, 1993. After Brad's death, Tommie became concerned that frequent visitations with Brad's many relatives were placing a great deal of stress on the children. On the advice of the children's counselor, Tommie and her new husband, Kelly Wynn, asked the Troxels to be supportive of the family, like their children's other three sets of grandparents and two sets of great-grandparents, and to accept a less intrusive role. The Wynns suggested that the Troxels visit one Sunday a month, and on birthdays and other special occasions and holidays. However, the Wynns resisted the Troxels' desire for overnight visits every other weekend, on all

the Troxel relatives' birthdays, for two weeks in the summer, and on other holidays.

The Troxels initiated this lawsuit to obtain the visitation they desired. They did not seek custody. They did not allege that the Wynns were unfit. The Wynns continued to allow the Troxels reasonable visitation even after the Troxels brought this lawsuit. The children's therapist testified that the Wynns' actions were in their children's best interest and that the Troxels' demands were self-directed and might be harmful to the children.

The trial court entered a "visitation plan" that ordered the Wynns to provide overnight visitation one weekend a month, one week in the summer, and four hours on each of the Troxels' birthdays. The plan required the Wynns to "confer with" and "notify" the Troxels regarding a wide variety of issues, including a requirement that the Troxels be notified of all school and extracurricular events, and that "the parties . . .

confer with regard to answering all questions as to the death of Brad Troxel."

The Washington Supreme Court accepted review of an intermediate appellate court's decision that the Troxels could not maintain this action because neither RCW 26.10.160 nor RCW 26.09.240 grants grandparents standing to seek visitation when a custody proceeding is not pending. ***Visitation of Troxel***, 87 Wn. App. 131, 137, 940 P.2d 698 (1997). The Washington Supreme Court as a matter of state law interpreted the visitation statutes at issue to allow "any person" to petition the courts for visitation "at any time," without limitation. Given its interpretation of the statutes, the court below was compelled to strike down the visitation statutes at issue as violative of the constitutionally protected interest of custodial, fit parents to raise their children without state interference in the absence of evidence of harm to the child. ***Custody of Smith***, 137 Wn.2d 1, 969 P.2d 21 (1998)

REASONS FOR DENYING THE PETITION

The Petition does not raise a significant undecided question of federal constitutional law, and this Court's consideration of the extraordinarily broad, standardless visitation statutes interpreted and struck down by the Washington Supreme Court would not reach the social issues touched upon in the Petition or addressed in other states with narrower grandparent visitation statutes. This Court should deny the Petition.

I. THIS COURT HAS ADEQUATELY ADDRESSED THE INTERESTS THAT MAKE THE WASHINGTON VISITATION STATUTES UNCONSTITUTIONAL.

Fundamental rights are those "long recognized at common law as essential to the orderly pursuit of happiness . . . ." ***Meyer v. Nebraska***, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). The long-recognized family autonomy right relied upon by the Washington State Supreme Court is derived not from blood ties alone, but from "the emotional attachments that derive from the intimacy of

daily association, and from the role it plays in 'promoting a way of life' through the instruction of children." ***Smith v. Org. of Foster Families for Equality and Reform***, 431 U.S. 816, 844, 97 S.Ct. 2094, 2109, 53 L.Ed.2d 14 (1977); *see also* ***Wisconsin v. Yoder***, 406 U.S. 205, 232, 92 S.Ct. 1526, 1641, 32 L.Ed.2d 15 (1972) ("The history and culture of Western Civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of the children is now established beyond debate as an enduring American tradition.").

Contrary to petitioners' assertions (Petition at 12-13), the Washington Supreme Court's decision has not "idealized" the nuclear family at the expense of the extended family or other social organizations. Instead, it is the daily intimacy of the custodial relationship that gives rise to the fundamental right to autonomous child rearing relied upon by the Washington Supreme Court to strike down the visitation statutes at issue. This Court has already adequately addressed and confirmed the

constitutional protection of that family autonomy right in ***Moore v. City of East Cleveland***, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed. 531 (1977).

Mrs. Moore lived with her son and two grandsons, one of whom was less than one year old when she began caring for him after his mother died. 431 U.S. at 496-97. Mrs. Moore challenged the constitutionality of a statute that criminalized her grandsons' residence in her home. In striking down the statute, this Court upheld "the tradition of uncles, aunts, cousins, and especially grandparents *sharing a household* along with parent and child . . . ." 431 U.S. at 504 (emphasis added).

This Court in ***Moore*** recognized that protecting such custodial family units is necessary and proper because "throughout our history . . . [o]ut of choice, necessity, or sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home." 431 U.S. at 505. In such situations, "[d]ecisions concerning child rearing, which ***Yoder***,

Meyer, . . . and other cases have recognized as entitled to constitutional protection, 'ong have been shared with grandparents . . . *who occupy the same household* . . . ." 431 U.S. at 505 (emphasis added). *See also* ***Michael H. v. Gerald D.***, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 634 (1989) (biological father had no constitutional right to seek visitation with child born into mother's marriage with another man); analysis of ***Moore*** in J. Bohl, ***The "Unprecedented Intrusion": A Survey and Analysis of Selected Grandparent Visitation Cases***, 49 Okla. L. Rev. 29, 37-48 (1996).

It is this custodial family autonomy right that was properly relied upon by the Washington Supreme Court in striking down the visitation statutes at issue. That a "third party initiates the intervention" (Petition at 10) in visitation actions under these statutes makes the invocation of the state's power more offensive, not less. Neither ***Moore*** nor any other case suggests that grandparents living outside the family have a right to invoke the power of the state to demand visitation with

children over a fit custodial parent's objections. This Court has adequately addressed the interests that make the Washington visitation statutes unconstitutional and this case is not a proper vehicle for review of those rights.

II. THE EXTRAORDINARILY BROAD WASHINGTON VISITATION STATUTES WOULD NOT BRING UP THE SOCIAL ISSUES ADDRESSED IN THE PETITION.

The cases cited in the Petition and in Justice Talmadge's dissenting opinion in the Washington Supreme Court interpret "grandparent rights" statutes that restrict standing or visitation in varying degrees of severity, not statutes such as those struck down by the Washington Supreme Court that would allow "any person" to seek visitation "at any time." For instance, the Kentucky case cited by the Smiths as proof of a conflict in state decisions that should be addressed by the Court considers a "grandparent rights" statute with explicit standards for standing and visitation. The Kentucky court noted that "[i]f the statute gave the grandparents the unrestricted right of visitation, there would be much less reluctance to declare it unconstitutional."

See ***King v. King***, 828 S.W.2d 630, 632 (Ky.) *cert. denied,* 506 U.S. 941, 113 S. Ct. 378, 121 L. Ed. 2d 289 (1992) (discussed in Petition at 9). This Court in fact denied certiorari three years after ***King*** in a Georgia case that struck down the Georgia grandparent visitation statute as unconstitutional under the U.S. Constitution. ***Brooks v. Parkerson***, 265 Ga. 189, 454 S.E.2d 769, *cert. denied*, 516 U.S. 942, 116 S. Ct. 317, 133 L. Ed. 2d 301 (1995).

The extraordinary breadth of the statutes struck down by the Washington Supreme Court would limit the utility of review in this case. The interpretation of these statutes to allow "any person" to seek court-ordered visitation "at any time," without limitation or meaningful standards, was a matter of state, not federal constitutional, law. The decision of the Washington Supreme Court irrevocably rests on that state law determination. This Court could easily affirm the Washington Supreme Court's decision that such standardless intrusion in matters of family life would be unconstitutional without

addressing the very different issues raised by statutes in other jurisdictions, which may reflect a reasoned legislative response to the consequences of various living arrangements on the best interests of children.

Likewise, the fact that the mother's husband has adopted the Troxel children could only have the effect of limiting the utility of review. Contrary to petitioners' assertions (Petition at 13), there is nothing in the record that suggests that Kelly Wynn adopted his wife's children in an attempt to cut off visitation by the Troxels. And as the majority opinion in the Washington Supreme Court did not rely on the adoption of the children in its statutory analysis, it would not be properly an issue before this Court in reviewing the visitation statutes.

The petitioners' wide-ranging speculation as to the types of family relationships that might justify court-imposed visitation demonstrates the Washington Supreme Court's wisdom in declaring unconstitutional a statutory scheme that fails to provide any standards whatsoever in any of the

situations addressed in the Petition at 16-17. This Court is not in the business of providing parameters for third party visitation statutes, yet that is what answering the societal questions posed by petitioners would require it to do. The extraordinarily broad Washington statutes would not bring up for consideration the social issues addressed in the Petition and this case is not a proper vehicle for review of these extrajudicial matters.

CONCLUSION

The Petition should be denied.

RESPECTFULLY SUBMITTED this 17th day of August, 1999.

CATHERINE W. SMITH
Counsel of Record
EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.
7170 Columbia Center
701 Fifth Avenue
Seattle, WA 98104
(206) 624-0974

Attorneys for Respondent
Tommie Granville